United States Court of Appeals

for the Second Circuit

APPELLEE'S REPLY BRIEF

76-1570

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

UNITED STATES OF AMERICA, :

Appellant, :

-against- :

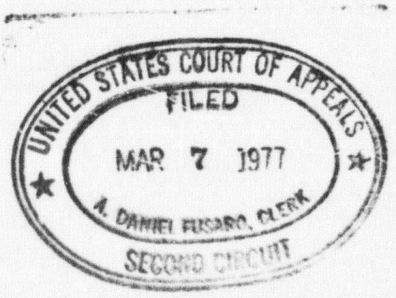
HENRY GOMEZ LONDONO, :

Defendant-Appellee. :

- x

Docket No.
76-1570

APPELLEE'S MEMORANDUM IN RESPONSE
TO THE GOVERNMENT'S REPLY



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Pursuant to the Court's invitation at oral argument, this memorandum is submitted in response to the Government's argument, raised in its reply brief, that the search conducted in this case by Customs officers was justifiable as a "border search" and thus was proper, irrespective of defects in the affidavits supporting the search warrant issued by the Magistrate.

Apparently, the Government's position is that Customs agents could lawfully search Gomez Londono's luggage without either warrant or probable cause on the theory that the search occurred at or near a border, pursuant to 19 U.S.C. § 1581(a). Thus, through the wholly retrospective incantation of the phrase "border search," the Government, at the eleventh hour, now suddenly seeks to justify the conduct of the Customs agents in

this case on a theory which had neither been raised nor pursued in the Court below.

At the outset, it should be noted that the phrase "border search," like "automobile," is not a shibboleth in the presence of which the protections of the Fourth Amendment simply evaporate. See Coolidge v. New Hampshire, 403 U.S. 443 (1971).

Rather, any relaxation of the warrant and probable cause requirements of the Constitution can be justified only on the presence of such peculiar facts and circumstances which make such a search reasonable within the Fourth Amendment. To the extent that "border searches" are exempt from the warrant and probable cause requirements, they are manifestly not exempt from the "reasonableness" requirements of the Fourth Amendment itself; accordingly, to justify their dispensation, the Government must demonstrate the presence of such compelling facts and circumstances which would nonetheless render the search reasonable.

Moreover, the relevant statute, 19 U.S.C. § 1581(a), must, of course, be construed in a manner consistent with the

Fourth Amendment.* As the Supreme Court has only recently pointed out, in an analogous context:

> It is clear, of course, that no act of Congress can authorize a violation of the Constitution. But under familiar principles of constitutional adjudication, our duty is to construe the statute, if possible, in a manner consistent with the Fourth Amendment.
>
> * * * *
>
> It is not enough to argue, as does the government, that the problem of [law enforcement] ... is a serious one. The needs of law enforcement stand in constant tension with the Constituion's protection of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyality to constitutional safeguard. Almeida-Sanchez v. United States, 413 U.S. 266, 272-273 (1973).

Ever since Terry v. Ohio, 392 U.S. 1 (1968), the determination of whether warrantless searches on less than probable cause are nonetheless reasonable within the Fourth Amendment has required an analysis of the competing interests of Government, on the one hand, and the individual, on the other. This analysis has invariably turned upon a balancing of the legitimate law enforcement need to undertake a given

*In addition, of course, the statute must be construed in light of the regulations promulgated thereunder by the Secretary of the Treasury. To the extent that the regulations confer a more limited authority than does the statute, Customs officers are bound by the narrower regulations, not the broader statute. See United States v. Jones, 368 F. 2d 795 (2nd Cir. 1966). We shall turn to this issue infra.

practice of arrest, search, or seizure, and the nature of intrusion incident to the arrest, search, or seizure.

Where the legitimate needs of law enforcement outweigh a minimal intrusion into personal security, the Court has found reasonable the particular police practice under scrutiny; where the balance weighs in favor of individual interests, on the other hand, the intrusion is proscribed by the Fourth Amendment; absent, of course, the traditional requisite of probable cause or the interposition of Magistrate.

In a recent tetralogy of cases, United States v. Brignoni-Ponce, 422 U.S. c (1975); Almeida-Sanchez v. United States, 413 U.S. 266 (1973); United States v. Ortiz, 422 U.S. 891 (1975); and United States v. Martinez-Fuerte, _____ U. S. _____, 96 S. Ct. _____ (July 6, 1976), the Supreme Court has applied this very analysis to a variety of border search practices and procedures, making clear that, far from occupying a special category of generalized exemption from constitutional control, "border searches," to the extent lawful, constitute an exception to the Fourth Amendment's requisites, which, like all other exceptions, must be examined in light of the legitimate needs of law enforcement, the nature of the intrusion upon personal security, and the privacy interests sought to be sacrificed. Accordingly, we respectfully submit, the same analysis is apposite here.

Historically, the governmental interest in searches and seizures conducted at or near United States borders has rested upon the compelling national and sovereign interest in stemming the flow of illegal aliens, contraband, dutiable commodities, as well as goods or merchandise which may be imported or exported only in limited quantity. See e.g., United States v. Martinez-Fuerte, supra (illegal aliens); United States v. Weil, 432 F. 2d 1320 (9th Cir. 1970) (contraband and undeclared dutiable merchandise); United States v. Glaziou, 402 F. 2d 8 (2d Cir. 1968) (importation of contraband). In these instances, compelling national interests justified an appropriately limited warrantless intrusion on facts not sufficient to generate probable cause.

The balance of relevant facts in the present case, however, stands in sharp contrast. Here, Customs agents, after having arrested the defendant, sought neither contraband, dutiable merchandise, commodities which may only be imported or exported in limited amounts, nor, perforce, illegal aliens. Here, Customs agents sought money, which may be imported or exported freely and without limitaton, subject only to the requirement that a report be filed declaring the amount in excess of $5,000, subject to international transportation. Customs agents thus sought "an otherwise innocent item, on which a duty is not generally collected" United States v. San Juan, 545 F. 2d 314, 319 (2d Cir. 1976), with

respect to which the law requires only the filing of a report, which, if not filed, gives rise only to prosecution for a misdemeanor.

In this connection, it is important to address the alleged nexus between the law enforcement activities in this case and the defendant's suspected narcotics involvement, a matter about which one member of the panel expressed concern at argument.

To be sure, there exists a vital and compelling national interest in the interdiction of the flow of narcotics into the United States, and, doubtlessly, the attention of Customs agents was drawn to Gomez Londono by information from an informant in Colombia, South America, that he was departing with a large sum of currency in order to engage in a narcotics transaction in South America.

It is to be emphasized, however, that there is not so much as a scintilla of evidence in this record suggesting that Gomez Londono had violated, was violating, or was about to violate, any narcotics laws of the United States.

At no time has the government alleged, nor could it in good faith allege, that the search here was based on probable cause to believe that Gomez Londono had violated or was violating any of the narcotics laws <u>of the United States</u>.

It is noteworthy that the Colombian informant's information was extraordinarily detailed, down to Gomez Londono's passport number. The informant, thus, was obviously someone who knew Gomez Londono very well, and was familiar with his movements and activities. However, conspicuously absent is any information that Gomez Londono had brought narcotics into the United States, had engaged in narcotics transactions while in the United States, was taking narcotics out of the United States, or had conspired with others while in the United States.

Nor may this lack of evidence be explained away as mere incompleteness in the information provided. Following Gomez Londono's arrest, the Government had ample opportunity to continue its investigation, and, indeed, despite the case's factual simplicity, did not indict him until approximately a week and a half after his arrest. Had the Government any information that Gomez Londono was conspiring with others in narcotics traffic here, his alleged violation of 31 U.S.C. § 1101 would doubtless have been charged as a felony, pursuant to 31 U.S.C. § 1059. Instead, however, the violation of the Bank Secrecy Act charged in the indictment against Gomez Londono alleged only the misdemeanor violation embodied in 31 U.S.C. § 1058.

None of this, of course, is to suggest that Customs officers -- or other federal law enforcement agents -- had no legitimate interest in Henry Gomez Londono. Further investigation

by our own agents overseas or through international police agencies certainly would have been justified. The issue here, rather, is whether, in light of that interest, a search conducted solely and exclusively to discover money which may be imported and exported lawfully in any quantity, and predicated, at best, on a misdemeanor violation which may have been committed in futuro was justified, in light of the fact that as of the time of his airport confrontation, Gomez Londono had violated no law, to the knowledge of the agents, nor did the agents have any reasonable basis for believing that Gomez Londono had violated any law. See United States v. Henry Gomez Londono, 422 F. Supp. 519, 523 (E.D.N.Y. 1976); Government's Appendix at A-128.

Against this less than compelling governmental interest, and taking into account less onerous alternatives* available to

*Martinez-Fuerte, supra, makes clear that the availability of less onerous alternatives which would satisfy the same governmental and law enforcement interests satisfied by the actual intrusion involved, is relevant to determining the reasonableness of the procedure actually employed. Here, of course, one less onerous alternative is the application for a search warrant pursuant to 31 U.S.C. § 1105 -- an alternative for which the agents in fact opted, thus conclusively demonstrating the availability of the warrant procedure in this case. Moreover, however, the agents could have, as they should have, tendered Gomez Londono Form 4790 and demanded that he fill it out. Had Gomez Londono completed the form in a manner inconsistent with the facts as the agents believed them to be, they could have arrested him on probable cause to believe that he had violated the Bank Secrecy Act and then could have proceeded to search his luggage, pursuant to a warrant.

(Footnote continued on following page)

satisfy legitimate governmental concerns, See United States v. Martinez-Fuerte, supra, at 49 L. Ed. 2d 1127-1128, must be weighed the nature of the intrusion and its impact upon personal security and liberty.

The intrusion here was as complete as any intrusion upon personal liberty and privacy could be. Gomez Londono was arrested and detained. His luggage, consumer goods, and other possessions previously checked on board the aircraft were removed therefrom and held at Kennedy Airport. All items were subject to a thorough search by Customs agents. The search was, of course, contested as having been pursuant to a defective warrant; but even assuming, arguendo, that neither a warrant, nor probable cause, was required, the activities of the Customs agents in this case far exceeded those limited practices and procedures which the Supreme Court has previously held justify a dispensation from the warrant and probable cause requirements of the Fourth Amendment under the rubric "border search." See

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(Footnote continued from previous page)

In such case, the Government could have proceeded in its prosecution with propriety. Thus, there is nothing in this case to suggest the impracticability of an application for a warrant or that proceeding only on probable cause would have defeated some genuine and compelling governmental interest. Indeed, quite the opposite appears on the face of the record. Moreover, these less onerous alternatives seem to be what Congress had in mind when it enacted the search warrant statute as a part of the Bank Secrecy Act, See 31 U.S.C. § 1105.

United States v. Martinez-Fuerte, supra; Cf., United States v. Ortiz, supra; United States v. Brignoni-Ponce, supra; United States v. Almeida-Sanchez, supra.

Moreover, the search conducted in the present case was directed against one departing the United States, not entering it. In support of the proposition that a "border search" may be conducted in these reversed curcumstances, the Government relies upon United States v. Stanley, 545 F.2d 661 (9th Cir. 1976).

But Stanley is wholly inapposite in this context. Although Customs agents there lacked probable cause, it is clear from the facts that there existed a reasonable suspicion that a vessel, the OS National, had crossed into Customs waters, from the United States carrying a shipment of marijuana, contrary to law. Indeed, at least one judge, concurring in the result in Stanley, did so on the belief that probable cause existed for a seizure and search of the vessel.

Further, Stanley involved a search for which a warrant would have been manifestly impracticable and where the prompt action of Customs officers and the Coast Guard was essential if the opportunity for search was not to be lost forever. Finally, the object of the search in Stanley was marijuana, a contraband substance.

Here, in sharp contrast, not one of that concatenation of factors existed. Here the defendant was under arrest, and his luggage and possessions safely ensconced, at Kennedy Airport. Here, again, the opportunity to obtain a warrant was more than abundant; indeed, that is precisely what Customs agents did. Third, the search in the present case was for currency, not contraband. Thus, to the extent that Stanley purports to establish a legitimate power on the part of Customs officers to search outgoing vessels, packages and persons, its determination in that respect must be understood in light of the particular factual predicate upon which the case arose.

Indeed, no other case has ever held that persons leaving the United States and their possessions (excepting, of course, carry-on luggage), may be subject to a thorough search without a warrant and without probable cause. This dearth of case authority must be understood in light of the regulations promulgated by the Secretary of the Treasury pursuant to 19 U.S.C. §§1581 and 1582. Although both statutes purport to provide broad authority for warrantless searches without probable cause of persons, vessels, or things, whether entering or leaving the United States, the regulations are much more severely restrictive.

19 C.F.R. §§162.3 and 162.5 provide the relevant authority to Customs agents. Section 162.3 authorizes Customs agents to board any vessel "at any place in the United States or within the customs waters of the United States..." Section 162.5, conferring the authority to search, is much narrower:

> A customs officer may stop any vehicle and board an aircraft arriving in the United States from a foreign country for the purpose of examining the manifest and other documents and papers and examining, inspecting, and searching the vehicle or aircraft.

19 C.F.R. §162.5 [emphasis added].

Finally, §162.6 provides:

> All persons, baggage and merchandise arriving in the customs territory of the United States from places outside thereof are liable to inspection and search by a customs officer. District Directors and Special Agents in charge are authorized to cause inspection, examination, and search to be made under §467 Tariff Act of 1930, as amended (19 U.S.C. 1467), of persons, baggage, or merchandise, even though such persons, baggage, or merchandise were inspected, examined, searched, or taken on board the vessel at another port or place in the United States or the Virgin Islands, if such is deemed necessary or appropriate.

19 C.F.R. §162.6 [emphasis added].

Thus, the regulations limit the authority to search, without a warrant or probable cause, to persons, vessels, parcels and packages arriving in the

United States from outside the country and does not extend to persons, vessels and things leaving the United States. To the extent that the regulations are narrower than the statute under which the regulations were promulgated, the regulations clearly control. Governmental action is a creature of law, and Customs agents must conform their conduct to the limitations of the regulations promulgated by their superiors.

In United States v. Jones, 368 F.2d 795 (2d Cir. 1966), this Court reversed a conviction obtained under a regulatory scheme similar to the one at hand, on the ground that Customs agents had failed to abide by regulations promulgated by the Secretary of the Treasury. This Court there pointed out:

> Our decision rests upon the principle that because the government has failed to follow its own regulations, promulgated in the proper exercise of the Secretary of the Treasury's discretion, its action can have no effect ... There is no novelty in holding that where an official is given discretionary power by statute, promulgates regulations as to how the power is to be exercised and then fails to follow his own regulations, the action is of no effect.

Id., 368 F.2d at 799 (citations omitted).

Thus, here, the search of an outbound defendant's luggage was improper, even under the "border/customs search"

rationale, because the regulations which govern the activity of Customs officers restrict their activities to incoming persons, vessels, aircraft and things.

Indeed, it seems hardly likely that Congress would have enacted specific search warrant legislation as a part of Title 31 §§1058 et seq., had it believed that enforcement of the provisions of the Bank Secrecy Act regarding the international transportation of monetary instruments could be undertaken without warrant or probable cause. See 31 U.S.C. §1105.

Finally, in this connection, the Government's "border/customs search" argument must be seen in light of its implications. If the Government is correct, then for any reasons, real, fanciful, or imagined, anyone about to depart the United States, would be subject to interdiction and search of all of his luggage and possessions. The right to expect that one's possessions would be secure from governmental intrusion would then be, at best, a thin illusion. Surely, it is far too late in the day to suggest that the individual right of personal privacy - even at international airports - depends wholly upon such arbitrary discretion as Customs officers may exercise. Cf. United States v. Martinez-Fuerte, supra, at 49 Lawyer's Edition 2d. 1128-1129.

But even assuming, arguendo, that a warrantless search without probable cause under the rubric "border/customs search" would have been appropriate in the present case, that, quite simply, is not what transpired. Applying the retrospective patina of "border search" upon the facts of the present case requires not only a different analysis of what, in fact, occurred but certain assumptions about what might or might not have happened, since the search in the present case was, in fact, pursuant to a warrant, obtained two days after Gomez Londono's arrest.

Taking the facts as they are, on the other hand, makes it clear that the "border search" rationale is simply inapposite. While a given exception to the Fourth Amendment's warrant or probable cause requirement may be applicable at one particular point in time, it does not follow necessarily that it will be applicable later.

For example, if a man is arrested in his home, the area immediately surrounding him may be searched, incident to his arrest. But, it does not follow that, once having arrested a man at home, without searching the immediate surrounding area, police officers may later return without a warrant and search the very area which they <u>might</u> have lawfully searched earlier. <u>Compare</u>,

Chimel v. California, 395 U.S. 752 (1969) with Vale v. Louisiana, 399 U.S. 30 (1970).

By the same token, the search in the present case was, in fact, undertaken two days after Gomez Londono's arrest. Even assuming that a warrantless search would have been appropriate at the time of Gomez Londono's detention, the reasons, such as they were, then existing for a dispensation from the warrant and probable cause requirements manifestly did not exist forty-eight hours later. For this reason, as well, the government's efforts to find an analysis which meets the facts at this late juncture should be rejected by this Court.

In addition to the "border search" issue, oral argument in this case disclosed other matters which neither side briefed, in light of the disposition below, the Government's explicit waiver on appeal with regard to the District Court's determinations regarding the reach of 18 U.S.C. §1001 and 31 U.S.C. §1101(b) on the facts of this case, and the Government's development of a single issue in its main brief. To the extent that the Government, at oral argument, resurrected certain issues, we respectfully request this brief opportunity to now respond to them.

In the District Court, the Government argued that the search was proper because supported by probable cause justifying the issuance of a warrant. In its brief on appeal, the Government abandoned this rationale and substituted instead several arguments deriving from 31 U.S.C. §1105 and a recent "border search" case. However, at oral argument, the Government reasserted its probable cause argument.

We respond, briefly, by pointing out that probable cause is not, and never has been, a genuine issue in this case. It is not as if the defendant-appellee's position were that the quantum of evidence available to the Customs agents fell somewhat short of probable cause. Rather, appellee's position is, has been, and the Government, we assumed, had conceded, that the facts available to the Customs agents, far from falling short of probable cause, established affirmatively that no crime or violation of laws of the United States had occurred, or was occurring, in their presence.

Thus, it was not a factual insufficiency, but rather, the very completeness of the affidavit submitted to the magistrate which mandated the finding that the warrant application was legally insufficient. This, we submit,

was what the District Court had in mind when it held:

> No one was before the magistrate to suggest the legal problems related to prosecutorial conduct which the very completeness of the affidavit might have disclosed to the magistrate. To say, therefore, that he acted indiscretely in granting the warrant is impossible. Nevertheless, having reached the foregoing conclusion as to the nature of the defects in counts 1 and 2 of the indictment [charging violations, respectively, of 18 U.S.C. §1001 and 31 U.S.C. §1101(b)] it necessarily follows that, practically helpless as the magistrate was to reach the point determined in this Court, the nature of law requires the conclusion that the affidavit supporting the warrant was insufficient in law.

United States v. Gomez Londono, supra, 422 F.Supp. at 526.

To the extent that other issues relating to the sufficiency of the counts of the indictment, the point in time when the obligation to file the report required under 31 U.S.C. §1101(b) arises, and other related matters were raised at oral argument, the Court's attention is invited to defendant's memorandum of law submitted to the District Court, which treats these matters in detail. (Government's Appendix at A-60 through A-87).

Finally, the stipulation entered into in the Court below was based upon the understanding of both sides as to what were the appropriate issues. Neither side articulated

any belief that a "border search" rationale would be in any way applicable to this case until the Government raised the issue in its reply brief before this Court. To the extent, therefore, that the record is incomplete in this regard, we respectfully request that, rather than reverse on a border search rationale, if the Court is so inclined, the Court should remand the case to the District Court for a further elaboration of the record.

CONCLUSION

The Order Appealed From Should Be Affirmed.

Dated: New York, New York
March 7, 1977

Respectfully submitted,

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